No. 05-184

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SALIM AHMED HAMDAN,

Petitioner,

v.

DONALD H. RUMSFELD,
SECRETARY OF DEFENSE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* HUMAN RIGHTS FIRST, PHYSICIANS FOR HUMAN RIGHTS, CENTER FOR VICTIMS OF TORTURE, ADVOCATES FOR SURVIVORS OF TORTURE AND TRAUMA, BOSTON CENTER FOR REFUGEE HEALTH AND HUMAN RIGHT, CENTER FOR JUSTICE & ACCOUNTABILITY, DOCTORS OF THE WORLD-USA, GLOBAL LAWYERS AND PHYSICIANS, HEARTLAND ALLIANCE FOR HUMAN NEEDS & HUMAN RIGHTS, PROGRAM FOR SURVIVORS OF TORTURE AND SEVERE TRAUMA, ROCKY MOUNTAIN SURVIVORS CENTER, TORTURE ABOLITION AND SURVIVORS SUPPORT COALITION INTERNATIONAL

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QUESTION PRESENTED

Question 1 of the Questions Presented, as set forth in Petitioner's Brief, is as follows:

> Whether the military commission established by the President to try petitioner and others similarly situated for alleged war crimes in the "war on terror" is duly authorized under Congress's Authorization for the Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224., the Uniform Code of Military Justice (UCMJ); or the inherent powers of the President.

A determination of whether authorization exists for the use of military commissions cannot be made in the abstract, and must be made with reference to the rules under which the military commissions would operate. As promulgated by the executive, those rules provide latitude to rely on any evidence that "in the opinion of the Presiding Officer ... would have probative value to a reasonable person" – a rule that is broad enough to permit reliance on evidence extracted by torture or other abusive treatment. Use of such evidence would violate due process, the Convention against Torture (CAT) and the 1949 Geneva Conventions. To the extent the military commissions may be authorized, they must operate within limitations imposed by these bodies of law. Military commissions operating outside the limits imposed by those bodies of law would be unauthorized and unconstitutional.

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STATEMENT OF INTEREST OF *AMICI*

Amici are organizations with expertise in U.S. and international law concerning the use of torture, and in the effects of torture on persons subjected to it. The interest of each *amicus* is discussed in the accompanying Appendix.[1]

SUMMARY OF ARGUMENT

This Court has granted certiorari to address whether legal authorization exists for the military commissions established at the U.S. Naval Base at Guantanamo Bay, Cuba to try petitioner Salim Ahmed Hamdan and others similarly situated for alleged violations of international law.

The issue presented cannot be separated, either practically or as a matter of law, from the question of how the executive has directed those military commissions to operate. As constituted by the Department of Defense, the military commissions would have the latitude to rely upon any evidence that "in the opinion of the Presiding Officer ... would have probative value to a reasonable person." Dept. of Defense, Military Comm'n Order No. 1, dated Aug. 31, 2005, at § 6(D)(1) ("DOD Order No. 1"), *available at* http://www.dod.mil/news/Sep2005/d20050902order.pdf. This standard would allow the introduction in commission proceedings of evidence extracted by torture or other unlawful coercion. Past practice and existing indictments indicate that the Government intends – and indeed, has begun – to do just that. *See* Point III, *infra*.

Any authority the President may have to establish military commissions for trials of Guantanamo Bay detainees does not, and cannot, extend to allowing the use of evidence

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[1] The parties have consented in writing to the participation of *amici*. Their written consents have been filed with the Clerk of the Court. No party in this case authored this brief in whole or in part, or made any monetary contribution to its preparation and submission.

obtained by torture. None of the sources of authority the Government relies upon authorizes the creation of tribunals to pass judgment and impose sentence in reliance on such evidence. U.S. constitutional and treaty law could not be clearer in rejecting not only the use of such evidence, but the legal legitimacy of any proceeding that would allow it. Tyrannical regimes may rely on confessions exacted by torture. But as this Court has long promised: "So long as the Constitution remains the basic law of our Republic, America will not have that kind of government." *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944).

Despite this, the Government would have this Court put its advance imprimatur on a tribunal that appears poised to decide guilt or innocence, and impose sentences of imprisonment or even death, in reliance on information gained under the kinds of unlawful coercion that, according to official reports, have been commonplace at Guantanamo Bay. Never in its history has this Court put its imprimatur on a tribunal that allows the admission of evidence obtained by "[t]he rack, the thumbscrew, the wheel," or modern variants. *Chambers v. Florida*, 309 U.S. 227, 237-38 (1940).

Amici believe that this Court should make clear that a trial system based on evidence gained by torture is not a *legal* proceeding at all; by its very nature, it is beyond the power of the executive to authorize. At a minimum, this Court should make clear that the question of presidential power to use military commissions cannot logically be answered without identifying constitutional limits on that power. Exclusion of coerced evidence is first among those limits.

Beyond the legal question of authority and its limits that are embraced within the question presented, there are pressing reasons for the Court to address the question of coerced evidence now. Prudence, judicial economy and the smooth operation of the judicial system require concrete and predictable guidance. Where that guidance has not been provided elsewhere, it is the Court's responsibility to provide

it. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 532-38 (2004) (plurality opinion) (describing the procedures appropriate for determining whether detainees may be classified as "enemy combatants"). With respect to the military commissions, guidance from the executive has been the opposite of clear and predictable. Commission rules have been adopted, modified or amended no fewer than eight times since the commissions' creation in 2001, and the President, by commission rules, has retained the authority to change those rules at any time, regardless of fairness or prejudice to the defendants.[2]

Making clear now that evidence obtained from unlawful coercion cannot be admitted in commission proceedings is essential to secure Hamdan any prospect of a fair trial, and to restore the legitimacy of these badly tainted proceedings, both for defendants and in the eyes of the world.

Official and press accounts of abusive treatment of detainees in U.S. custody are well-documented and widespread. Where the motivation for that treatment has been a misguided desire to extract evidence for use in subsequent proceedings, a ruling by this Court foreclosing any such use would remove this improper incentive. A clear statement that evidence obtained by abusive and unlawful coercive methods is inadmissible would deter conduct that is "abhorrent" to American law, Mem. for Deputy Attorney General James B. Comey, dated Dec. 30, 2004, at 1, *available at* http://www.usdoj.gov/olc/dagmemo.pdf ("12/30/04 DOJ Mem."), and would minimize the suffering of persons who are "presumed innocent" of any crime, DOD Order No. 1 at § 5(B).

Amici respectfully urge this Court not to decide this case without reaffirming that use of evidence obtained by unlawful coercion has no place under American law in passing judgment and imposing sentence. The legitimacy of

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[2] *See* 32 C.F.R. § 9.11.

future proceedings, the safety of those held at Guantanamo Bay, and adherence to basic standards of fairness and justice all depend on a clear statement that reliance on the fruits of torture will not be tolerated under law.

ARGUMENT

I. THE GOVERNMENT HAS NO AUTHORITY TO CREATE TRIBUNALS THAT ALLOW EVIDENCE OBTAINED BY TORTURE OR OTHER UNLAWFUL COERCIVE METHODS

The question of whether legal authorization exists for the Guantanamo Bay military commissions cannot be answered in the abstract, without reference to the procedures for how those commissions would operate. As this Court has held, any authorization for military commissions can only exist within "constitutional limits." *Ex Parte Quirin*, 317 U.S. 1, 28 (1942); *see also* Alexander Hamilton, Pacificus No. 1 (June 29, 1793), *reprinted in* 15 THE PAPERS OF ALEXANDER HAMILTON 33, 39 (Harold C. Synett et al., eds., 1969) (recognizing as a "general doctrine ... of our constitution" that "the Executive Power" is vested in the President subject to "the exceptions and qualifications which are expressed in the instrument").

As constituted by the executive, the Guantanamo Bay military commissions would go beyond those "constitutional limits," *Quirin*, 317 U.S. at 28, insofar as they allow the commissions to pass judgment and impose sentence in reliance on evidence obtained by torture or other unlawful coercion. *See* DOD Order No. 1, at § 6(D)(1) (allowing reliance on such evidence "if, in the opinion of the Presiding Officer ... the evidence would have probative value to a reasonable person"). In the context of the commission trials at issue here, it is critical to understand this provision for what it is: a mechanism for allowing the introduction of evidence obtained under unlawful coercion. Assigned JAG officers have resigned from commission prosecution duty out

of concern that this provision will be used precisely to allow the admission of unlawfully coerced evidence.[3] One of the latest commission indictments appears to do just that.[4] Moreover, in habeas proceedings before the district court, the Government indicated that it was not foreclosed from using evidence procured by torture in status review proceedings involving Guantanamo detainees.[5]

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[3] *See* Jess Bravin, *Two Prosecutors At Guantanamo Quit in Protest*, THE WALL STREET JOURNAL, Aug. 1, 2005, at B1 (noting that the resigning prosecutors asserted that fellow prosecutors were "ignoring torture allegations"); Neil A. Lewis, *2 Prosecutors Faulted Trials for Detainees,* THE NEW YORK TIMES, Aug. 1, 2005, at A1 (same); *see also* Michael Isikoff, *Secret Memo -- Send to Be Tortured*, NEWSWEEK, Aug. 8, 2005, *available at* http://www.msnbc.msn.com/id/8769416/site/newsweek/ (reporting that an FBI agent warned superiors that "U.S. officials who discussed plans to ship terror suspects to foreign nations that practice torture could be prosecuted for conspiring to violate U.S. law"); James G. Meek, *At War with Gitmo Grilling*, THE NEW YORK DAILY NEWS, Feb. 13, 2005, *available at* http://www.nydailynews.com/news/wn_report /story/280282p-240219c.html (describing complaints by JAG officers to government officials that coercive interrogation techniques used at Guantanamo Bay were unlawful).

[4] *See* Military Commission Charge Sheet Against Binyam Ahmed Muhammed, *available at* http://www.defenselink.mil/news/Nov2005/ d20051104muhammad.pdf (charges including evidence of connections to Abu Zubayda and Khalid Sheikh Mohammed); Brian Ross & Richard Esposito, *Sources Tell ABC News Top Al Qaeda Figures Held in Secret CIA Prisons*, ABC NEWS, Dec. 5, 2005, *available at* http://abcnews.go.com/WNT /Investigation/story?id=1375123 (noting unrefuted allegations that Zubayda and Mohammed were subjected to waterboarding).

[5] Michael J. Sniffen, *Panel OKs Torture in Detention of Enemies*, THE BOSTON GLOBE, Dec. 3, 2004, *available at* http://www.boston.com/news/nation/washington/articles/2004/12/03/panel_oks_torture_in_detention_of_enemies/?rss_id=Boston%20Globe%20--%20National%20News (Principal Deputy Associate Attorney General Brian Boyle stated that if the military's combatant status review tribunals "determine that evidence of questionable provenance were reliable,

No authorization exists for military commission trials that can use such evidence in passing judgment and imposing sentence. The Government claims to find the requisite authorization for these military commissions in three places: (1) the Authorization for the Use of Military Force ("AUMF"), Pub. L. 107-40, 115 Stat. 224 (2001), against the perpetrators of the attacks on September 11, 2001 and those who harbor them; (2) the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 821 and 836; and (3) the President's inherent power as Commander-in-Chief of the armed forces.

These claimed sources of authority are limited in scope. None of them authorizes the President to supplant the Constitution or override treaties that are the supreme law of the land. None of them authorizes use of evidence obtained by torture or other abusive treatment in passing judgment and imposing sentence.

A. The AUMF

Congress passed the AUMF shortly after the terrorist attacks on September 11, 2001. The AUMF authorizes the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" on September 11 or have "harbored such persons." 115 Stat. 224 (2001). The AUMF does not mention military commissions. The AUMF only authorizes such force as is "necessary and appropriate."

In assessing the existence and scope of any authorization, it is necessary to give meaning to the word "appropriate" in the AUMF. *See Hamdi*, 542 U.S. at 520-521 ("longstanding law-of-war principles" based on the Geneva and Hague Conventions limit the executive's authority to detain enemy combatants under the AUMF's authorization

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nothing in the due process clause [of the Constitution] prohibits them from relying on it").

for use of "necessary and appropriate force"); *M'Culloch v. Maryland*, 17 U.S. 316, 421 (1819) (interpreting the Constitution's "Necessary and Proper" clause as authorizing Congress to enact legislation that is "appropriate" and "consist[ent] with the letter and spirit of the constitution").

Any authorization the AUMF might confer does not extend beyond what is "appropriate" under the Constitution, laws and treaties of the United States. Under those bodies of law, it is never "appropriate" to rely on evidence obtained by torture or other abusive methods. Anglo-American law has accepted this principle for more than three centuries, and it is universally accepted under international law. It finds expression in treaties such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), *available at* http://www.unhchr.ch /html/menu3/b/h_cat39.htm, the Third Geneva Convention Relative to the Treatment of Prisoners of War ("Third Convention" or "GCIII"), 6 U.S.T. 3316 (1955), and the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War ("Fourth Convention" or "GCIV"), 6 U.S.T. 3516 (1955). The universality of this principle is not in serious dispute. *See* Point II, *infra* (discussing applicable constitutional provisions and treaties barring consideration of such evidence).

Had Congress sought to confer authority on the President to supplant our constitutional tradition by creating tribunals to pass judgment and impose sentence in reliance on evidence obtained by torture, that would have raised serious constitutional questions. Moreover, if Congress had wanted to achieve that constitutionally dubious result, it would have needed to use language very different from – and much more explicit than – the language found in the AUMF. *See Hamdi*, 542 U.S. at 542-51 (Souter, J., concurring in part, dissenting in part) (discussing the need for a clear statement of congressional intent in analogous circumstances).

Similarly, if Congress had wanted to override treaties that are the supreme law of the land, *see* U.S. CONST. art. VI; *Francis v. Francis*, 203 U.S. 233, 240 (1906), it would have needed to use language very different from, and much more explicit than, that found in the AUMF. Since the earliest days of the Republic, this Court has recognized that an act of Congress "ought never to be construed to violate the law of nations, if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). Applying this doctrine, this Court repeatedly has construed statutes to avoid inconsistency with treaties to which the U.S. is signatory. *See e.g., Wash. v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979) ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights."); *Chew Heong v. United States*, 112 U.S. 536, 540 (1884) (construing statute to be consistent with treaty). The AUMF cannot be read to provide "explicit statutory language," *Washington*, 443 U.S. at 690, to override the prohibitions of the Geneva Conventions and CAT.

B. The UCMJ

The second source that the Government relies upon is found in sections 821 and 836 of the UCMJ, 10 U.S.C. §§ 821 and 836. To the extent these provisions can be read as authorizing the creation of military commissions, that authority does not extend to the creation of tribunals that violate the laws of war, the Constitution and other provisions of the UCMJ itself.

By its express terms, section 836 of the UCMJ, 10 U.S.C. § 836, gives the President authority to create procedures for military commissions, including "modes of proof," that are "not contrary to or inconsistent with" other provisions of the UCMJ. These other provisions include Article 31 of the UCMJ, entitled "Compulsory Self-Incrimination Prohibited," which codifies the privilege against compulsory self-incrimination for all military

proceedings. 10 U.S.C. § 831(a).[6] That provision echoes the Fifth Amendment privilege against self-incrimination, which bars the use of confessions obtained by torture or other forms of compulsion.[7] *See Bram v. United States*, 168 U.S. 532, 542 (1897); *Chavez v. Martinez*, 538 U.S. 760, 772 (2003).[8]

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[6] Section 831(a) of the UCMJ, 10 U.S.C. § 831(a) states:

> (a) *No person subject to this chapter* [defined in 10 U.S.C. §802(a) to include members of the armed forces] *may compel any person to incriminate himself* or to answer any question the answer to which may tend to incriminate him. (Emphasis added.)

[7] Section 831(d) of the UCMJ further gives effect to the privilege against self-incrimination codified in § 821(a) by requiring the exclusion of confessions obtained "through the use of coercion ... in a trial by court-martial." 10 U.S.C. § 831(d). Section 831(d) is fully applicable to military commissions because "both classes of courts [*i.e.*, courts-martial and military commissions] have the same procedure." Sen. Hearing on S. 3191 Before the Subcomm. on Military Affairs, 64th Cong. (Feb. 7, 1916) (testimony of Judge Advocate General Enoch M. Crowder, whose Senate testimony on the subject of military commissions has been recognized as "authoritative," *Madsen v. Kinsella*, 343 U.S. 341, 353 (1952)); *see also* William Winthrop, *Military Law and Precedents*, Vol. II, at 841-42 (2d ed. 2000) (1920) ("[A]s a general rule, ... a military commission will – like a court-martial – ... ordinarily and properly be govern, on all important questions, by the established rules and principles of law and evidence.").

[8] Applying Article 31 of the UCMJ, military courts have overturned convictions based on coerced confessions, *see United States v. Jones*, 22 C.M.R. 494 (ABR 1956); *United States v. West*, 31 C.M.R. 256 (CMA 1962) *United States v. Steward*, 31 M.J. 259 (CMA 1990); *United States v. O'Such*, 37 C.M.R. 157 (CMA 1967), even where the confession was elicited in a foreign country by foreign authorities acting on their own initiative and not at the direction of the United States, *see United States v. Jourdan*, 1 M.J. 482 (AF CMR 1975), *aff'd*, 50 C.M.R. 917 (CMA 1979) (barring the use of a coerced confession given to Belgian authorities, and emphasizing that a lesser standard does not apply merely "because a confession or admission is taken in a foreign jurisdiction by foreign authorities").

The other section of the UCMJ that the Government relies upon, 10 U.S.C. § 821, simply confirms that the creation of jurisdiction for courts-martial does not oust military commissions of concurrent jurisdiction consistent with other statutes and the "laws of war." The 1949 Geneva Conventions provide "clearly established principle[s] of the law of war." *Hamdi*, 542 U.S. at 520. Using evidence obtained by torture or other inhumane treatment violates Common Article 3 and other provisions of the Geneva Conventions. *See* Point II(C), *infra*. Moreover, the only statute (other than the UCMJ itself) that the Government has relied upon is the AUMF, which, as discussed above, does not authorize tribunals that rely on evidence obtained by torture or other unlawful coercion in passing judgment and imposing sentence.[9]

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[9] The recently-enacted Graham-Levin-Kyl amendment to the National Defense Authorization Act for Fiscal Year 2006, H.R. 1816, 109th Cong. § 1005 (2005), does not authorize military commissions to use evidence obtained by torture or other unlawful coercion. Section 1005(b)(1) of the Act applies only to determinations of whether a detainee should be treated as an enemy combatant. In that inapposite context, § 1005(b)(1) would require a Combatant Status Review Tribunal (CSRT) or Administrative Review Board (ARB) to assess, to the extent practicable, "(A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and (B) the probative value (if any) of any such statement." This provision only applies to status determinations by a CSRT or an ARB, and even there, does not permit the use of such evidence if prohibited by applicable provisions of the Constitution or laws of the United States (which are discussed in Point II, *infra*). *See* § 1005(e)(2)(c)(ii). By its express terms, § 1005(b) does *not* apply to military commissions for determining guilt or innocence and imposing sentence, which are at issue here. More relevant here is § 1003(a), which provides that "[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subjected to cruel, inhuman, or degrading treatment or punishment," and defines such treatment to mean the "cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution ... and the Convention Against Torture." § 1003(d).

Ex Parte Quirin, 317 U.S. 1 (1942), and *Application of Yamashita*, 327 U.S. 1, 7 (1946), which the court below cited, found authorization for military commission trials in the Articles of War (the predecessor the UCMJ). However, *Quirin* supports *amici*'s position under any fair reading. It does so by making clear that any authorization for military commissions is circumscribed and only applies "within constitutional limitations." *Id.*, 317 U.S. at 28; *see also id.* (treating the order creating the military commission in *Quirin* as authorizing "those functions which may constitutionally be performed" by the military in time of war).

The "constitutional limitations" that are applicable here include the Fifth Amendment's self-incrimination and due process clauses, discussed in Point II(A), *infra*. Neither *Quirin* nor *Yamashita* addressed the applicability of those constitutional limitations in military commissions. Indeed, there was no suggestion in *Quirin* or *Yamashita* of the proceedings being tainted by reliance on evidence obtained by torture or other abusive treatment. Widespread reports of mistreatment at Guantanamo Bay make it impossible to say the same of this case. *See* Point III(B), *infra*.

Moreover, *Quirin* and *Yamashita* were decided before ratification of CAT and the 1949 Geneva Conventions. As a result, those cases did not present the issue this Court now faces, of construing the UCMJ so as to avoid any inconsistency with those treaties. *See Schooner Charming Betsy*, 6 U.S. (2 Cranch) at 118. When the UCMJ is construed as required by *Charming Betsy* and its progeny, it cannot be read as providing "explicit statutory language," *Washington*, 443 U.S. at 690, to override the rules set forth in CAT and the Geneva Conventions.

Nothing in the UCMJ authorizes the creation of tribunals for persons such as Hamdan that could rely upon evidence obtained by torture or other unlawful coercion. Use

of such evidence would be contrary to the Constitution, treaties and the provisions of the UCMJ itself.

C. The President's Inherent Authority as Commander-in-Chief

The remaining source of authority the Government relies upon – the President's authority under Article II as "Commander in Chief of the Army and Navy of the United States," U.S. CONST., art. II, § 2, cl. 1 – is also of a limited nature. The military commissions established here, like the presidential action that this Court rejected in *The Steel Seizure Cases*, "cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

Three limits on executive authority are relevant here. First, the Constitution entrusts the subject matter at hand – trial and punishment for violations of international law – not to the executive under Article II, but rather to Congress under Article I. Thus, the Constitution confers upon Congress and not the President the power to "define and punish ... Offenses against the Law of Nations ..." U.S. CONST. art. I § 8. Congress has not given the President authority to create tribunals that could rely on evidence obtained by torture or other unlawful coercion in passing judgment and imposing sentence for violations of international law.

The second limit on the President's "inherent" power also is of a constitutional dimension. The Fifth Amendment prohibition against the use of evidence obtained by torture or coercive methods bars the executive from creating tribunals that rely on evidence procured such methods. This constitutional prohibition is a check on presidential power. *See* Curtis A. Bradley and Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 554-55 (2004).

The third limit comes from affirmative congressional action. Congress has expressed its abhorrence for evidence procured by torture in several ways. It has ratified treaties, including CAT and the Geneva Conventions, that bar the use of evidence obtained by torture. These treaties are the supreme law of the land; the President does not have power to abrogate them. Indeed, Congress has enacted a criminal statute, 18 U.S.C. § 2441, making it a felony to violate Common Article 3 of the Geneva Conventions, and has enacted the Torture Act, 18 U.S.C. §§ 2340, 2340A, making it a felony to commit torture "outside the United States." Moreover, in enacting the UCMJ, Congress codified the privilege against self-incrimination, 10 U.S.C. § 831(a), and limited the President's authority to formulate procedures for military tribunals that are "not contrary to or inconsistent with" that protection. 10 U.S.C. § 836.

These actions are a strong expression of Congress' intent to bar any use of evidence adduced by torture, including by military tribunals, in passing judgment or imposing sentence. "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb ...." *Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring).

* * *

In sum, any authority the President may have to require military commission trials of Hamdan and other Guantanamo detainees is of a limited nature. It cannot exceed "constitutional limitations," *Quirin*, 317 U.S. at 28, including the Fifth Amendment self-incrimination and due process clauses. Nor does it override treaty obligations. The Guantanamo Bay military commissions, as constituted, go beyond these essential limits. There is no authorization for military commissions as so constituted.

II. THE USE OF EVIDENCE OBTAINED BY TORTURE OR OTHER UNLAWFUL COERCION WOULD VIOLATE THE CONSTITUTION AND TREATIES RATIFIED BY CONGRESS

The "universal repudiation of torture" is reflected, *inter alia*, in "centuries of Anglo-American law" and in "international agreements, exemplified by the United Nations Convention Against Torture ...." 12/30/04 DOJ Mem. at 1.

A. The Constitution Bars the Use of Evidence Obtained by Torture or Other Unlawful Coercion

For well over three centuries, Anglo-American jurisprudence has rejected the use of evidence procured by torture. While torture was practiced in England into the mid-1600s as a matter of royal prerogative, *A(FC) v. Secretary of State for the Home Department*, [2005] UKHL 71 (H.L. Dec. 8, 2005) (slip op. at 6), the abolition of the Star Chamber in 1640 brought an end to torture warrants in England. *Id.* After 1628, the Privy Council never again issued a torture warrant, and after 1640 the king never again issued a torture warrant under his own signet. *Id.* at 47-48. Thereafter, "'trial by rack'" and the use of evidence procured by torture were "'utterly unknown to the law of England.'" 4 William Blackstone, *Commentaries* *320.

By the time of the American Revolution, it was well-established that the use of evidence obtained by torture or physical coercion had no place in English law. *A(FC))*, at 5-14. "In rejecting the use of torture, whether applied to potential defendants or potential witnesses, the common law was moved by the cruelty of the practice as applied to those not convicted of crime, by the inherent unreliability of confessions or evidence so procured and by the belief that it degraded all those who lent themselves to the practice." *Id.* at 6. The rejection of evidence obtained by torture was

"hailed as a distinguishing feature of the common law ...." *Id.* at 5.[10]

The framers shared the English common law's abhorrence for evidence obtained by torture. Their decision to bar any resort to compulsory self-incrimination "sprang in large part from knowledge of the historical truth" that the ascertainment of guilt or innocence "could not be safely entrusted to secret inquisitional processes ...." *Chambers*, 309 U.S. at 237.

Before the enactment of the Bill of Rights and since then, history has provided many examples of tyrannical regimes that would "seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture." *Ashcraft*, 322 U.S. at 155. However, such practices have no place in our legal system. "So long as the Constitution remains the

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[10] Even in the context of the modern threat of terrorism, the recent decision of the British House of Lords in *A(FC)* has reaffirmed the English common law's longstanding rejection of the use of evidence obtained by torture of either the accused or a third-party witness. The British case is analogous to this case because it dealt with tribunals – like the military commissions in issue here – that were empowered by executive order to consider evidence that "would not be admissible in a court of law." *Id.* at 64. The British intermediate appellate court held that the fact that evidence might have been obtained by torture went to the weight of the evidence, but did not render it inadmissible. *Id.* at 5. The Law Lords unanimously rejected that position. Noting the "universal revulsion against torture," *id.* at 24, they held that evidence obtained by torture is absolutely prohibited, no matter how urgent the perceived emergency or how strong the provocation, *id.* at 40, and even if the coercive methods were carried out by foreign officials without complicity of British authorities. In support of that holding, Lord Bingham cited the statement from this Court's decision in *Rochin v. California*, 342 U.S. 165, 169 (1952), that due process prohibits methods of extracting evidence that "offend those canons of decency and fairness which express the notions of justice of English speaking peoples even toward those charged with the most heinous offense." *A(FC)*, at 10.

basic law of our Republic, America will not have that kind of government." *Id.*

Applying these principles, this Court has long recognized the prohibition against using evidence obtained through torture or unlawful coercion as an essential element of due process. *See Jackson v. Denno*, 378 U.S. 368, 377 (1964); *Lisenba v. California*, 314 U.S. 219, 237 (1941) ("To extort testimony from a defendant by physical torture ... is not due process ...."); *Brown v. Mississippi*, 297 U.S. 278, 282-87 (1936) (holding that the use of confessions procured after the defendants were stripped, whipped, and hung from a tree violated "essential elements of due process" and was antithetical to what one expects from "a modern civilization which aspires to an enlightened constitutional government").

The constitutional prohibition against using evidence obtained by unlawful coercion is not limited to self-incriminating statements. It applies with equal force to statements obtained by coercion from someone other than the accused. *See Ashcraft*, 322 U.S. at 156 (overturning *both* the conviction of a defendant who confessed after coercive treatment and the conviction of his co-defendant based on the coerced confession).[11]

Moreover, due process bars not only use of evidence obtained by "[p]hysical torture," but also evidence obtained by "less violent but equally reprehensible modes" of interrogation. *United States v. White*, 322 U.S. 694, 698 (1944); *see Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (due process bars evidence obtained by methods that "'fall far short of 'compulsion by torture'"); *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960) ("the blood of the accused is not

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[11] *See also, LaFrance v. Bohlinger*, 499 F.2d 29, 34 (1st Cir. 1974); *United States v. Merkt*, 764 F.2d 266, 274 (5th Cir. 1985); *Bradford v. Johnson*, 476 F.2d 66 (6th Cir. 1973); *United States v. Chiavola*, 744 F.2d 1271, 1273 (7th Cir. 1984); *Clanton v. Cooper*, 129 F.3d 1147, 1157-58 (10th Cir. 1997)

the only hallmark of an unconstitutional inquisition"); *Payne v. Arkansas*, 356 U.S. 560, 566 (1958) ("That petitioner was not physically tortured affords no answer to the question whether the confession was coerced, for 'there is torture of mind as well as body ....'"); *Malinski v. New York*, 324 U.S. 401, 405-11 (1945) (use of a confession obtained after the accused was held incommunicado and stripped naked violated due process); *Ashcraft*, 322 U.S. at 154 (interrogation for thirty-six hours without sleep was "inherently coercive"); *Chambers*, 309 U.S. at 239-41 (confessions obtained after nearly continuous interrogation for five days with little rest were the "result of compulsion").

While evidence procured by coercion is notoriously unreliable, *see Jackson*, 378 U.S. at 386,[12] reliance on such evidence is "constitutionally obnoxious" even if it statements obtained by such methods are probative, or can be "independently established as true." *Rochin v. California*, 342 U.S. 165, 173 (1952). The rationale for the constitutional prohibition is that reliance on such evidence is abhorrent to our system of justice:

> [O]urs is an accusatorial and not an inquisitorial system – a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.

Rogers v. Richmond, 365 U.S. 534, 540-41 (1961); *see also Rochin*, 342 U.S. at 173 (use of evidence obtained by coercive methods offends basic notions of "decency" and would "afford the brutality the cloak of law").

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[12] *See also United States ex rel. Caminito v. Murphy*, 222 F.2d 698, 703 (2d Cir. 1955) ("Aristotle ... wrote of torture 'that people under its compulsion tell lies quite as often as they tell the truth, ... sometimes recklessly making a false charge in order to be left off sooner ... so that no trust can be placed in evidence under torture.'").

When confronted with grave threats, some have argued that it is expedient or necessary to rely on evidence obtained by torture. However, the Constitution "proscribes such lawless means irrespective of the end." *Chambers*, 309 U.S. at 240-41; *see also Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21 (1866) ("No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of [the Constitution's] provisions can be suspended during the great exigencies of government. Such a doctrine leads directed to anarchy or despotism ....").

The constitutional protection against the use of evidence obtained by coercion squarely applies in any trial of Guantanamo Bay detainees for alleged violations of international law. *See Rasul v. Bush*, 542 U.S. 466, 483 n.15 (2004) (the allegations of Guantanamo Bay detainees "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States'" under 28 U.S.C. § 2241), citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-78 (1990) (Kennedy, J., concurring); *see also Verdugo-Urquidez*, 494 U.S. at 277-78 (Kennedy, J., concurring) ("the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic ...."); *Downes v. Bidwell*, 182 U.S. 244, 283 (1901) (aliens in non-incorporated U.S. territories "are entitled under the principles of the Constitution to be protected in life, liberty and property"); *In re Guantanamo Bay Detainee Cases*, 355 F. Supp. 2d 443, 454 (D.D.C. 2005) ("detainees at Guantanamo Bay possess enforceable constitutional rights").[13]

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[13] *See also United States v. Husband R. (Roach)*, 453 F.2d 1054 (5th Cir. 1971) (applying Fifth Amendment due process clause to aliens living in the Panama Canal zone, which the United States leased from the Republic of Panama); *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977) (applying due process clause to the Micronesian Claims Commission for aliens in the Trust Territory of the Pacific Islands); *United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. for Berlin 1979) (applying due process clause to aliens living in the American sector of Berlin).

It is significant in this regard that Guantanamo Bay is a "'territory over which the United States exercises exclusive jurisdiction and control.'" *Rasul*, 542 U.S. at 467.

> Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities .... [The Guantanamo Bay lease] is no ordinary lease. Its term is indefinite and at the discretion of the United States. What matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the "implied protection" of the United States.

Id., 542 U.S. at 487 (Kennedy, J., concurring). These unique characteristics of the lease at Guantanamo Bay make this case different from *Johnson v. Eisentrager*, 339 U.S. 763 (1950), in which German nationals challenged convictions in China for war crimes, and from *Verduga-Urquidez*, 494 U.S. 259, in which Mexican nationals challenged use of evidence resulting from a search in Mexico. *See also Rasul*, 542 U.S. at 486 (Kennedy, J., concurring).

Although Guantanamo Bay detainees may not share the full range of constitutional protections enjoyed by United States citizens and aliens in the United States, when they face a sentence of death or imprisonment as punishment for alleged violations of international law they are entitled at a minimum to the due process safeguard of a trial that is not tainted by evidence extracted by torture or other unlawful coercion. That conclusion is inescapable when one balances the "'risk of an erroneous deprivation'" of life or liberty against "the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process." *Hamdi*, 542 U.S. at 529 (quoting *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976)).

The "'risk of an erroneous deprivation'" of life or liberty, *id.*, would be high indeed because evidence obtained by torture and other means of coercion is notoriously unreliable. *Jackson*, 378 U.S. at 386. The dangers in using such evidence far outweigh any burden, and "transcend any difficulties" that foregoing its use might impose on the Government. *White*, 322 U.S. at 698; *see also Chambers*, 309 U.S. at 240-41.

B. The Convention Against Torture

CAT was ratified by the Senate in 1990. 136 CONG. REC. S17,486-01 (1990). Article 15 of CAT expressly prohibits the use of evidence procured by torture:

> *[A]ny statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings*, except against a person accused of torture as evidence that the statement was made. (emphasis added.)

Article 2(2) of CAT makes clear that torture cannot be justified by *any* exceptional circumstances:

> *No exceptional circumstances whatsoever*, whether a state of war or a threat of war, internal political instability or any other public emergency, *may be invoked as a justification of torture*. (emphasis added.)[14]

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[14] It is notable that CAT includes "mental" pain and suffering in its definition of torture. Thus, Article 1 of CAT defines torture as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any

CAT establishes the prohibition against torture "as a standard for the protection of all persons, in time of peace as well as war." S. EXEC. REP. NO. 101-30, at 11 (1990). CAT's protections are not limited to particular classes of persons or proceedings in civilian courts.

CAT's prohibition against the use of evidence obtained by torture is consistent with constitutional safeguards. As noted in the Senate Report on CAT, "[s]tatements made under torture generally would be subject to exclusion" under U.S. law and "could not be used against the person making them, since the statements would be involuntary." *Id.* at 24; *see also id.* at 19 ("the 5th and 14th amendments provide protection against torture").

In its recent decision in *A(FC)*, the British House of Lords relied on CAT in holding that evidence obtained by torture is not admissible in "any proceeding." *Id.*, slip op. at 30-31 ("[Article 15 of CAT] cannot possibly be read ... as intended to apply only in criminal proceedings. Nor can it be understood to differentiate between confessions and accusatory statements, or to apply only where the state in whose jurisdiction the proceedings are held has inflicted or been complicit in the torture.").

C. The 1949 Geneva Conventions

Use of evidence obtained by torture or other inhumane means in trials of Guantanamo detainees also violates the 1949 Geneva Conventions. At the heart of those Conventions is the universal proscription of torture.

The United States is party to the four 1949 Geneva Conventions. Two of those treaties are relevant here: the

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kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Third Geneva Convention Relative to the Treatment of Prisoners of War and the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War. The Third and Fourth Geneva Conventions provide that both POWs and civilians (including civilians suspected of hostile activities, GCIV(5)) must "at all times be humanely treated." GCIII(3) and (13), GCIV(3) and (27). They also prohibit physical or mental torture of POWs or civilians to induce admissions of guilt, GCIII(99), or to "secure from them information of any kind whatever," GCIII(17). *See also* GCIV(31) and (32).

Together, the Third and Fourth Geneva Conventions create a seamless web of protection for any persons caught up in the course of international "armed conflict" as defined in those instruments. Persons detained in such conflicts are either POWs protected under the Third Geneva Convention or, assuming they meet relevant nationality criteria, civilians (whether innocent or having unlawfully engaged in combat) protected under the Fourth Geneva Convention. In either case, such detainees are protected by the provisions of Common Article 3.[15]

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[15] The Government's theory, which the court below accepted, *see Hamdan v. Rumsfeld*, 415 F.3d 33, 40-42 (D.C. Cir. 2005), is that the Geneva Conventions leave a gap into which Hamdan has fallen, between the rules for conflicts between nation states and the rules for other conflicts "not of an international character." As Judge Williams explained in his concurring opinion in the court below, in rejecting that argument, "Common Article 3 fills the gap ...." *Id.*, 415 F.3d at 44 (Williams, J., concurring). *See generally*, *Amicus Curiae* Brief of Association of the Bar of the City of New York. Even if the Geneva Conventions were inapplicable to Hamdan, the Martens clause of the Hague Convention would nonetheless provide relevant protection. *See* Hague Convention (IV) on Laws and Customs of War on Land, Oct. 18, 1907, Preamble ("populations and belligerents remain under the protection ... of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience"); *see also United States v.*

Common Article 3 sets forth the "most fundamental requirements of the law of war," *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995), including the minimum protections to which Hamdan would be entitled. *See Amicus Curiae* Brief of Association of the Bar of the City of New York. On its face, Common Article 3 applies in the case of "armed conflict[s] not of an international character occurring in the territory of one of the High Contracting Parties" and protects "[p]ersons taking no active part in the hostilities, including members of armed forces ... placed hors de combat by ... detention." GCIII(3), GCIV(3). However, Common Article 3 has come to be understood as a "floor" below which parties may not go in any armed conflict.[16]

Krupp, 9 Trials War Crim. 1327, 1341 (Nur. Mil. Trib. 1949) ("[The Martens clause] mak[es] the usages established among civilized nations, the laws of humanity, and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the [Hague] Convention ... do not cover specific cases occurring in warfare, or concomitant to warfare."); Theodor Meron, "The Humanization of Humanitarian Law," 94 AM. J. INT'L L. 239, 245 (2000) (discussing the "strong language of the Martens clause").

[16] *See Prosecutor v. Delalic*, Case No IT-96-A, Judgment (International Criminal Tribunal for the former Yugoslavia, Feb. 20, 2001), at 143 (it is "indisputable that common Article 3, which sets forth a minimum core of mandatory rules, reflects the fundamental humanitarian principles which underlie international humanitarian law as a whole, and upon which the Geneva Conventions in their entirety are based"). Common Article 3's applicability to international armed conflict has also been recognized by the International Court of Justice (*Military and Paramilitary Activities [Nicaragua v. United States]*, 1986 I.C.J. 14, 114); the International Criminal Tribunal for Rwanda (*Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, p. 601 [Sept. 2. 1009]); and the Inter-American Commission for Human Rights (*Abella v. Argentina*, Case 11/137, Inter-Am. C.H.R. Rpt. No. 55/97. OEA/Ser.L/V/II.98, doc 6 rev. pp. 155-56). It long has been U.S. military policy to apply Common Article 3 to all armed conflicts. *See* Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT'L L.J. 367 (Summer 2004) at 14 & nn. 203, 204.

Common Article 3(1)(d) expressly bars "the passing of sentences ... without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people." The prohibition against the use of evidence obtained by torture is one of "the judicial guarantees which are recognized as indispensable by civilized people." *See* 12/30/04 DOJ Mem. at 1 (discussing the "universal repudiation of torture"); *A(FC)*, slip op. at 24 (discussing the "universal revulsion against torture"); CAT, art. 15, which has been ratified by 141 nations (*see* http://www.ohchr.org/english/countries/ratification/9.htm); International Covenant on Civil and Political Rights, art. 14(3)(g), *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm, which has been ratified by 154 nations (*see* http://www.ohchr.org/english/countries/ratification/4.htm) (recognizing a right not to be compelled to testify against oneself).

Willfully depriving any person in any armed conflict of the rights of a fair trial would violate Common Article 3. Moreover, willfully depriving an individual of fair trial rights protected by the Third and Fourth Geneva Conventions would constitute a "grave breach" of the Geneva Conventions. GCIII(130), GCIV(147). Violations of Common Article 3 and commission of "grave breaches" of the 1949 Geneva Conventions both are war crimes and are felonies under 18 U.S.C. § 2441.

D. After World War II, the U.S. Prosecuted Axis Officers for War Crimes for Participating in Trials Where Evidence Obtained by Torture Was Used

After World War II, this country and its Allies prosecuted and convicted Axis officers in war crimes trials for participating in military tribunals that relied on evidence obtained by torture. For example, the U.S. prosecuted Japanese Lt.-Gen. Sawada and other officers who served as

prosecutors and judges. Their crime was that they had "unlawfully and willfully tr[ied], prosecute[d] and adjudge[d]'" eight U.S. airmen, and sentenced them to death, in reliance on evidence obtained by "various forms of torture" "'in violation of the laws and customs of war.'" *Trial of Sawada*, Case No. 25, 5 Law Reports of Trials of War Criminals at 1, 2 (1948). The verdict against one officer was based solely on the fact that while acting as a judge in a military trial he relied on evidence obtained by torture in convicting and sentencing the American airmen. *Id.* at 7 and Commentary, *id.* at 12.

Fifty years later, it ill-suits this country to conduct war crimes trials of Guantanamo detainees under rules structured to allow admission of the same type of evidence.

III. THIS COURT SHOULD NOT PERMIT THE MILITARY COMMISSIONS TO PROCEED WITHOUT CLARIFYING THAT EVIDENCE OBTAINED BY UNLAWFUL COERCION OR TORTURE IS INADMISSIBLE

If this Court finds authority for military commission trials of Guantanamo detainees, it should not allow those trials to go forward without providing some guidance to the executive and lower courts on basic procedures that are needed to ensure compliance with the requirements of due process and core treaty obligations. *See Hamdi*, 542 U.S. at 532-38 (describing the procedures appropriate for determining whether detainees may be classified as "enemy combatants"). Those procedures, at a minimum, must include a prohibition against the use of evidence obtained by torture or other forms of unlawful coercion.

A clear statement by this Court rejecting the use of such evidence would have important benefits. Among others, it would protect against the dangers of unfair trials, and would remove the cloud that otherwise would hang over the legitimacy of these important trials in the eyes of the

world.[17] For Hamdan himself, the introduction of evidence obtained by such means would taint any trial and could not be considered harmless. *See Neder v. United States*, 527 U.S. 1, 8-9 (1999) (errors that "'infect the entire trial process,' ... and 'necessarily render a trial fundamentally unfair,' deprive defendants of 'basic protections" without which 'no criminal punishment may be regarded as fundamentally fair"); *Arizona v. Fulminante*, 499 U.S. 279 (1991).

More immediately, a clear statement on the limits of presidential authority in this respect would serve an essential prophylactic function, like that served by the Fourth Amendment exclusionary rule, in deterring practices that are "abhorrent both to American law ... and to international norms." 12/30/04 DOJ Mem. at 1.[18] If this Court provided clear notice that evidence obtained by unlawful coercion will not be admissible in trials of Guantanamo detainees, there would be less incentive to engage in such practices. This, in turn, would lessen the toll in human suffering for persons who are "presumed innocent." DOD Order No. 1 at § 5(B).

There should be no mistake that the toll in human suffering is great. Reports by government officials and in the press include reports of Guantanamo detainees being tied to a leash and led around like dogs, forced to wear women's undergarments, stripped naked, held in isolation for months

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[17] *See generally*, Debates in the House of Commons and House of Lords, July 7, 2003, *available at* http://www.nimj.org. *See also United States v. Hicks*: First Report of the Independent Legal Observer for the Law Council of Australia (Sept. 2004), *available at* http://www/.nimj.org/documents/Lasry_Report_Final.pdf.

[18] *See Elkins v. United States*, 364 U.S. 206, 217 (1960) ("The [Fourth Amendment exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it.").

on end and subjected to "48 of 54 consecutive days of 18 to 20-hour interrogations"[19]; subjected to sleep deprivation and forced nudity, with dog handlers vying to see who could make more detainees urinate or defecate on themselves[20]; being chained hand and foot to the floor for 18-24 hours or more without food or water, left to soil themselves, and being subjected to temperatures below freezing or "well over 100 degrees"[21]; being "gagged with duct tape that covered much of his head"[22]; having their genitals squeezed and thumbs bent back by interrogators[23]; being kept for months on end in isolation in "a cell that was always flooded with light"[24]; and of investigators breaking the vertebrae of a Guantanamo detainee (who was later exonerated) by "stomp[ing] on his back, dropp[ing] him on the floor and repeatedly forc[ing] his neck forward," leaving him in a wheelchair[25].

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[19] Army Regulation 15-6: Final Report, Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility, 18-20 (released July 13, 2005), *available at* http://www.defenselink.mil/news/Jul2005/d20050714report.pdf.

[20] Josh White, "Court Hears that Abu Ghraib Dog Tactics Came from Guantanamo," WASHINGTON POST, July 27, 2005, at A14.

[21] *Guantanamo Bay Detainee Cases*, 355 F. Supp. 2d at 474; Neil A. Lewis and David Johnston, "New F.B.I. Files Describe Abuse of Iraq Inmates," NEW YORK TIMES, Dec. 21, 2004, at A1 (summarizing an FBI report).

[22] *Id.*

[23] Neil A. Lewis, *F.B.I. Memos Criticized Practices at Guantanamo*, NEW YORK TIMES, Dec. 7, 2004, at A19.

[24] Letter from T.J. Harrington, Deputy Ass't Dir., Counterterrorism Division, Federal Bureau of Investigation to Major General Donald J. Ryder, Dep't of the Army, Criminal Investigation Command 2 (July 14, 2004).

[25] Carol D. Leonnig, *Detainee Claims U.S. Beating Led to Spinal Injury*, WASHINGTON POST, Aug. 13, 2005, at A18.

"[E]nhanced interrogation techniques" authorized by the CIA are similarly troubling.[26] They reportedly include methods such as "water boarding" (a practice that involves strapping the prisoner to an inclined board with his feet raised above his head, cellophane wrapped over his face and water poured over him to create the perception of drowning); "long term standing" (where detainees are forced to stand, handcuffed and with their feet shackled to a bolt in the floor for more than 40 hours); and "the cold cell" (where detainees are left to stand naked in a cell kept near 50 degrees and doused with cold water). The CIA's Inspector General has concluded, with good reason, that such techniques may violate CAT and expose agency officers to legal liability.[27] Yet such evidence as well stands to figure prominently in commission proceedings. *See* Military Commission Charge Sheet Against Binyam Ahmed Muhammed, *available at* http://www.defenselink.mil/news/Nov2005/d20051104muhammad.pdf.

Indeed, this case itself is marked by allegations that the petitioner has been subjected to abusive treatment. Hamdan alleges – without contradiction – that while in the custody of U.S. forces, he was beaten, forced to sit motionless for days on end and exposed to sub-freezing temperatures without adequate clothing. After being

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[26] Brian Ross and Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, ABC NEWS ONLINE, Nov. 18, 2005, *available at* http://www.abcnews.go.com/WNT/Investigation/story?id=1322866.

[27] *Id.* *See also* Douglas Jehl, *Report Warned on CIA's Tactics in Interrogation*, NEW YORK TIMES, Nov. 9, 2005, *available at* http://www.information clearinghouse.info/article10915.htm; Brian Ross, *History of an Interrogation Technique: Water Boarding*, ABC NEWS ONLINE, Nov. 29, 2005, *available at* http://abcnews.go.com/WNT/Investigation/story?id=1356870 ("The water board technique dates back to the 1500s during the Italian Inquisition. A prisoner, who is bound and gagged, has water poured over him to make him think he is about to drown.").

transferred to the detention facility at Guantanamo Bay in 2002, he was held in solitary confinement in an eight-by-five foot cell for ten months. Pet. Cert. App. 77a-78a. Should the Government seek to introduce evidence gleaned from Hamdan in the course of such treatment – and it would be surprising if it didn't – that evidence would be subject to the same concern of having been obtained under coercion.

Abusive treatment of the sort discussed above causes serious – and irreparable – harm to the persons subjected to it. It is not surprising that many Guantanamo detainees show symptoms of debilitating, chronic and possibly irreversible mental illness that can result from physical or psychological torture.[28]

The world will be closely watching the Guantanamo Bay trials to see whether this country will adhere to values that we proudly have championed for more than two hundred years. "It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." *Hamdi*, 542 U.S. at 532. The exigencies of the war on terrorism cannot excuse a departure from the universal prohibition against trials based on evidence gained under torture.

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[28] Symptoms of mental illness associated with torture and similarly abusive treatment include hallucinations, disorientation, severe depression, irritability, anger, garbled conversations, delusions and paranoia. Physicians for Human Rights, *Break them Down: Systematic Use of Psychological Torture by US Forces* (2005), at 52, *availabe at* http://www.phrusa.org/research/torture/pdf/psych_torture.pdf. In addition, the vast majority of torture victims suffer from post-traumatic stress disorder, which involves "repeated re-experiencing of the traumatic event." More than one-third fail to recover even years later. *Id.* at 50.

CONCLUSION

For the reasons set forth above, *amici* urge this Court to make clear that statements procured by torture or other cruel and inhumane treatment are not admissible in any proceeding conducted under color of U.S. law.

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Respectfully submitted,

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APPENDIX DESCRIBING AMICI

Human Rights First (HRF), formerly the Lawyers Committee for Human Rights, has worked since 1978 to advance the cause of justice, human dignity and respect for the rule of law. HRF works to support activists who strive to ensure that domestic legal systems incorporate international human rights protections. HRF has also worked to build a strong international system of justice and accountability for human rights crimes. Since 2002, HRF has consulted with the Pentagon in the formulation of military commission rules and procedures, has been one of a handful of international organizations invited to observe military commission proceedings at Guantanamo Bay, and has worked closely with interested parties there to promote compliance with fair trial procedures under U.S. and international law.

Physicians for Human Rights (PHR) is a non-profit organization that has worked since 1986 to investigate and expose violations of human rights throughout the world using medical and scientific methods. PHR's work includes efforts to stop torture, disappearances, and political killings by governments and opposition groups; to improve health and sanitary conditions in prisons and detention centers; to investigate the physical and psychological consequences of violations of humanitarian law; to defend medical neutrality and the right of civilians and combatants to receive medical care in times of war; to protect health professionals who are victims of violations of human rights; and to prevent medical complicity in torture and other abuses. In 1997, PHR shared in the Nobel Prize for Peace as part of the Steering Committee of the International Campaign to Ban Landmines.

The Center for Victims of Torture (CVT) is the first treatment program for torture victims established in the United States and the third such facility in the world. An international non-governmental organization headquartered in Minnesota, CVT also has offices in Washington, DC, Sierra Leone, and Liberia. Each year, it provides

rehabilitation care for thousands of torture survivors directly through its services programs in the U.S. and abroad. CVT is the technical service provider for all of the rehabilitation centers in the U.S. and also supports the capacity building of such centers in 17 other nations where torture has been endemic. Since its inception, CVT has also supported work to end the use of torture.

Advocates for Survivors of Torture and Trauma (ASTT) has been widely recognized for its work in treating survivors of torture and severe trauma since 1994. ASTT has developed an extensive network of partnerships among organizations and professionals who serve torture survivors, and has been instrumental in assisting clients to cope with the consequences of having been tortured and, in many cases, to obtain political asylum in the United States. AST has also been involved in training others to treat torture survivors, both in the United States and Guatemala.

The Boston Center for Refugee Health and Human Rights (the Center) was established in 1998 to provide medical and psychological assistance to persons who have been subjected to torture and related trauma. The Center's work includes providing comprehensive health care for refugees and survivors of torture, educating and training agencies and professionals who serve these persons, conducting clinical, epidemiological, and legal research, and advocating for the promotion of health and human rights.

The Center for Justice & Accountability (CJA) is a non-profit legal advocacy center that works to prevent torture and other severe human rights abuses around the world by helping survivors hold perpetrators accountable. CJA represents survivors and their families in actions for redress that call for the application of human rights standards under United States and customary international law.

Doctors of the World-USA was Founded in 1990 by a group of volunteer physicians. It is an international health

and human rights organization working where violations of human rights and civil liberties endanger public health. It mobilizes the health sector to provide essential care and services while training local residents and works to promote basic human fights in the United States and abroad. Since 1993, it has provided medical and psychological support to torture victims. In 2002, it provided evaluation services to more than 350 survivors of torture and other human rights violations in the United States.

Global Lawyers and Physicians (GLP), founded in 1996, is a non-profit nongovernmental organization that focuses on health and human rights issues. GLP was formed to reinvigorate the collaboration of the legal and medical/public health professions to protect the human rights and dignity of all persons. GLP works at the local, national, and international levels on issues with a focus on health and human rights, patient rights, and human experimentation.

Heartland Alliance for Human Needs & Human Rights strives to advance rights and reforms for vulnerable populations, and to engage the public on issues of human rights, poverty and immigration. Heartland Alliance's public engagement and advocacy efforts derive from direct experience assisting vulnerable populations, including torture survivors. Through the Marjorie Kovler Center for the Treatment of Survivors of Torture and the Midwest Immigrant & Human Rights Center, Heartland Alliance provides comprehensive medical, mental health, and legal services to survivors of torture in the United States. Heartland Alliance also trains legal and health care professionals to protect and provide treatment to victims of torture throughout the world, including in Iraq.

The Program for Survivors of Torture and Severe Trauma (PSTT) at the Center for Multicultural Human Services (CMHS) was officially established in 1998 to address the consequences of human rights abuses. PSTT's mission is to assist survivors of politically motivated torture

by providing a comprehensive range of services, including mental health, medical, legal, language, and social services, to address the complex results of their torture. In addition, PSTT staff is committed to providing education and training to agencies and professionals who serve these individuals.

Rocky Mountain Survivors Center, located in Denver, Colorado, assists survivors of torture and war, and their families, to create a new future. Since 1996, it has provided mental health counseling and coordinated access to health care, legal and social support services.

The Torture Abolition and Survivors Support Coalition International (TASSC) is the only organization run by and for survivors of torture. Its mission is to end the practice of torture wherever it occurs. A nonprofit organization founded in 1998, its guiding principles are that torture is a crime against humanity and that survivors are among the most effective voices in speaking out against torture. TASSC operates independently of any political ideology, government or economic interest.